

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1149

United States Court of Appeals

FOR THE SECOND CIRCUIT

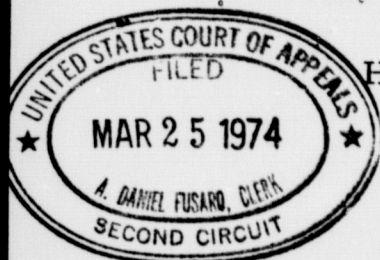
Docket 74-1149

A/S CUSTODIA,
Petitioner-Appellant,

—against—

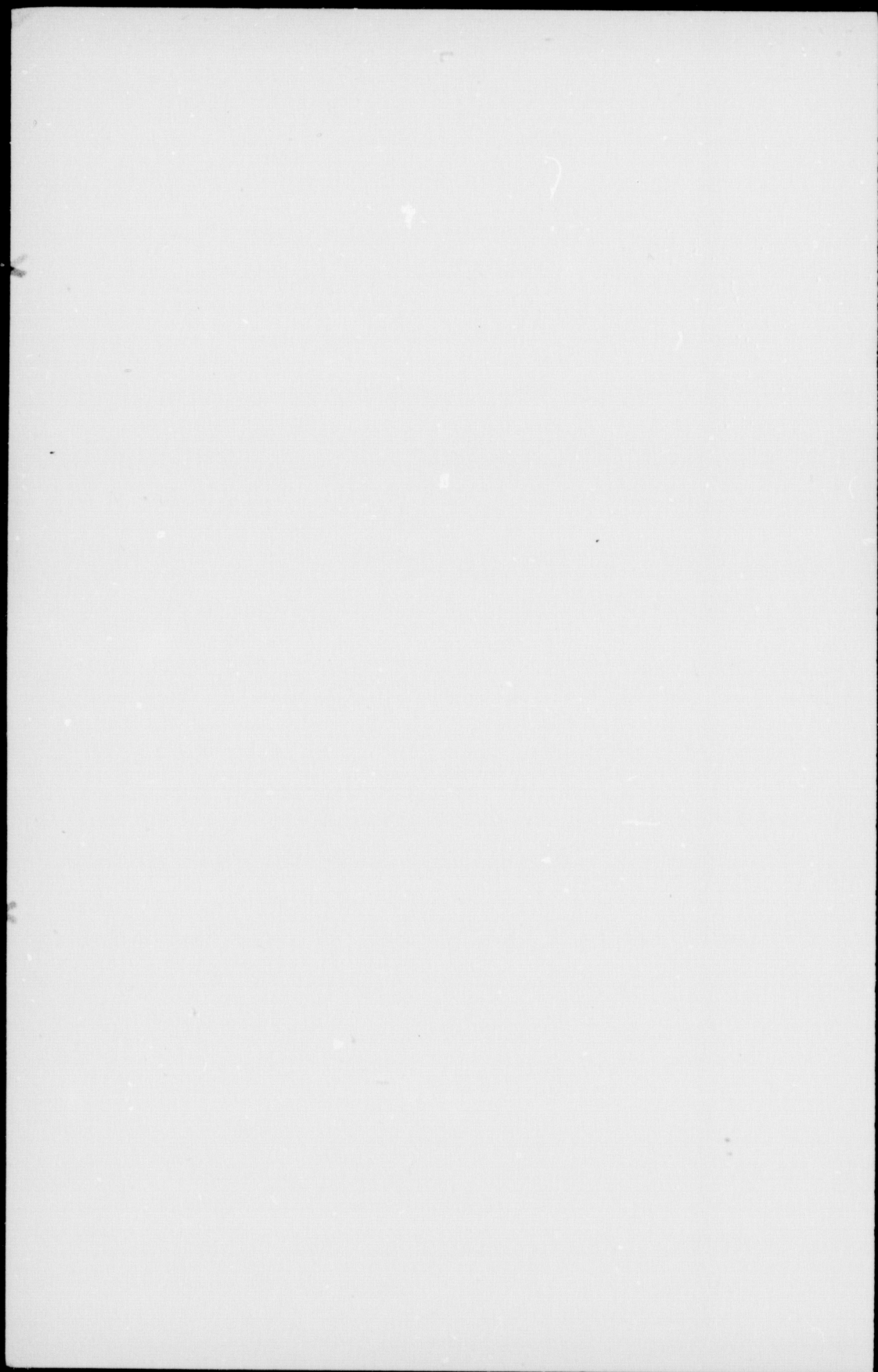
LESSIN INTERNATIONAL, INC.,
Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT



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FOR THE SECOND CIRCUIT

No. 74-1149

A/S CUSTODIA,
Petitioner-Appellant,
—against—

LESSIN INTERNATIONAL INC.,
Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT

THE ISSUE PRESENTED

Whether, under the Federal Arbitration Act, 9 U. S. C. § 1, *et seq.* an obligation to arbitrate arises only if there is a written *and* signed arbitration provision or whether the arbitration act merely provides that the arbitration provision be in writing.

STATEMENT OF THE CASE

This is an appeal by A/S CUSTODIA from an Order entered on the 15th day of November, 1973 in the United States District Court for the Southern District of New York denying Petitioner-Appellant's Motion to Compel Arbitration (App 51a) and from the Order entered on December 21, 1973 denying reargument of the Motion to Compel Arbitration (App 60a) and the judgment entered thereon on January 3, 1974 dismissing the Petition. (App 62a)

STATEMENT OF FACTS

Petitioner, A/S CUSTODIA, is a business entity organized and existing under and by virtue of the laws of the Kingdom of Norway and the owner of the M/V "FERN-GROVE" (App 3a). Respondent-Appellee, Lessin International Inc., is a corporation duly organized and existing under and by virtue of the laws of one of the States of the United States with an office at 80 West 30th Street, New York, New York. (App 3a)

In early June, 1973, Mr. Haakon Steckmest of the brokerage firm of J. H. Winchester & Co., received a quotation from the Charterers' brokers, Ocean Freighting & Brokerage Corporation, to carry a cargo of scrap from Tampa, Florida to Taiwan. Mr. Steckmest circulated this quotation to various cable correspondents. Approximately two weeks after this offer was originally quoted, Mr. Steckmest received an offer on this business from Messrs. Fearnley & Eger Befraktningssforretning A/S of Oslo, Norway. This offer was passed on to Ocean Freighting and on the same day, June 20, 1973, Ocean Freighting made a counter offer on the vessel on behalf of the Respondent-Appellee. (App 31a-32a)

When the terms of the contract were agreed to by the owners and charterer, the latter being the Respondent-Appellee herein, the charterers' brokers, Messrs. Ocean Freighting & Brokerage Corporation prepared a written statement of the agreement and forwarded it to Mr. Steckmest for signature. (App 31a)

The written agreement was forwarded under a cover letter dated June 25, 1973 (App 42a) which refers to the "M/V FERN-GROVE c/p dated June 21, 1973". The text of the covering letter reads as follows:

"Gentlemen :

We are enclosing herewith the original of the above dated Charter Party together with a working copy for your immediate use. We ask that you kindly have the Owners sign the original or alternatively you sign on their behalf and return to us today for signature by the Charterers.

At the same time, please advise the number of copies you will require after signature by the Charterers."

The cover letter is signed:

"OCEAN FREIGHTING & BROKERAGE CORP.

/s/ John F. Fitzsimmons
John F. Fitzsimmons,
Vice President"

In accordance with the request by the Charterers' brokers and after having obtained authority from the Owners, J. H. Winchester & Co., executed the written agreement on behalf of the Owners and returned it to the Charterers' brokers for execution. (App 32a)

Mr. Steckmest was later advised by the Charterers' brokers that the Charterer were not able to obtain the cargo which it intended to ship on the vessel and therefore it refused to sign the agreement. (App 32a)

The unsigned contract of charter party which was forwarded with the letter of June 25, 1974 provided for arbitration of disputes in New York as follows:

"33. Any and all differences and disputes of whatsoever nature arising out of this charter, shall be put to arbitration in the City of New York pursuant to the Laws relating to arbitration there in

force, before a board of three persons consisting of one arbitrator to be appointed by the Owners, one by the Charterers, and one by the two so chosen. The decision of any two of the three on any point or points shall be final." (App 39a)

The Petitioner-Appellant now claims to have been damaged in the amount of \$76,000.00 by the Respondent-Appellee's failure to perform the contract of charter and on September 11, 1973 Petitioner-Appellant named an arbitrator and demanded that the respondent name an arbitrator and that the dispute be submitted to arbitration in accordance with the arbitration provision. When the Respondent-Appellee failed to comply with the Petitioner's request, the Petitioner-Appellant brought the motion before the United States District Court for the Southern District of New York to compel arbitration pursuant to the Federal Arbitration Act.

ARGUMENT

POINT I

ALTHOUGH THE FEDERAL ARBITRATION ACT 9 U. S. C. § 4 REQUIRES A WRITTEN AGREEMENT TO ARBITRATE BEFORE ARBITRATION CAN BE COMPELLED IT DOES NOT REQUIRE A SIGNED WRITTEN AGREEMENT.

This Court in *Fisser v. International Bank*, 282 F. 2d 231 (2d Cir. 1960) referring to 9 U. S. C. §§ 2 and 4 noted

" . . . the act contains no built-in Statute of Frauds provision⁴ but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound by such written provision and of course parties can become

contractually bound absent their signatures. It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law. (Id at 233)

Footnote 4 contrasts the provisions of 9 U. S. C. §§ 2 and 4 with those of § 1449 of the New York Civil Practice Act which does require a signed writing to arbitrate an *existing* controversy, and states:

"4. Compare § 1449 of the New York Civil Practice Act which states that '[e]very submission to arbitrate *an existing controversy* is void, unless it or some note or memorandum thereof be in writing *and subscribed by the party to be charged therewith or by his lawful agent*' (Emphasis added.)" (Ibid).

Indeed even if there were a statute of fraud requirement here, a strong argument could be made that the covering letter of June 25 signed by the Charterers' broker and the enclosed contract of charter party sufficiently satisfied the requirement. As the Honorable Sylvester J. Ryan noted in a very recent decision, *Interocean Shipping Co., v. National Shipping & Trading Corp.*, and *Hellenic International Shipping, S. A.*, 71 Civ. 3363 dated February 28, 1974:

"Certainly in the modern business world and particularly in the shipping business where speed of negotiations is of the essence . . . telex communications and particularly telexes (used so regularly in the shipping world) are a sufficient 'note or memorandum in writing to answer for the default of another.' *Christman v. Maristella Compania Naviera*, [349 F. Supp. 845, 851; *aff'd* 468 F. 2d 620]; Sec. 5-701, *General Obligations Law*; *Trevor v. Wood*, 36 N. Y. 307 (1867).

'Telegrams and teletype messages, too, are sufficient,' says Professor Williston in his *Treatise on Contracts*, 3rd Ed., Sec. 468. The California Court, applying a statute of fraud similar to the New York statute took judicial notice of the extensive use of teletype machines being used among business brokers and found that such a message satisfied the required writing, *Joseph Denunzio Fruit v. Crane*, 79 F. Supp. 117 (S. D., Cal., 1948), 188 F. 2d 569 (9th Cir., 1949) *cert. den.* 342 U. S. 820" (Id at 16).

In *Interocean Shipping Co., supra* Judge Ryan citing *Kulukundis Shipping Co., v. Amtorg Trading Corp.*, 126 F. 2d 978 (2d Cir. 1942) and *Fisser v. International Bank, supra* noted that it is not necessary for parties to execute a formal charter party to be bound to all its terms including arbitration and the court held that a fixture letter signed by an agent of the respondent in that case was sufficient to require the respondent to participate in the arbitration.

Even Judge Metzner's decision in *Garnac Grain Company, Inc. v. Nimpex International Inc.*, 249 F. Supp. 986 (S. D. N. Y. 1964), upon which the Respondent and Judge Ward have placed such heavy reliance, does not require that the arbitration provision itself be signed by anyone. The decision holds only that:

"Section 4 requires at least a written fixture making reference to a standard charter containing an arbitration clause, before arbitration can be compelled." *Ibid.*

Thus, in the case at bar the covering letter signed by the Charterers' broker and referring to the charter which contains the arbitration clause should satisfy Judge Metzner's interpretation of Section 4 of the Federal Arbitra-

tion Act. But it is the Appellant's position in this case that the *Garnac* decision is erroneous and that Section 4 of the Arbitration Act does not require any signature at all.

Domke in his work on Commercial Arbitration states on p. 46:

"The 'in writing' requirement has still another meaning, namely that the arbitration agreement does not have to be signed. This conforms to the widespread practice in many fields of trade and commerce that commercial transactions are concluded by the exchange of letters or telegrams, by the intermediary of brokers who exchange bought and sold notes, and by the conduct of the parties after receipt of contract forms which are not signed and returned. Numerous court decisions show the tendency to accept any manifestation of the intent of the parties to be bound by an arbitration clause without signing it."

POINT II

THE DISTRICT COURT ERRED IN NOT GIVING THE APPELLANT AN OPPORTUNITY TO PRESENT EVIDENCE AT A FORMAL TRIAL IN SUPPORT OF ITS POSITION THAT THE UNSIGNED CHARTER DATED JUNE 21, 1973 IS A WRITTEN AGREEMENT BETWEEN THE PARTIES.

In dismissing the petition below the Court ruled:

"In order to determine whether there is a triable issue, it is necessary to examine the record. Upon the record presented to the Court, Petitioner has not demonstrated that it is entitled to a trial on the issue of whether the parties had entered into "a written agreement for arbitration" as required by 9 U. S. C. § 4. All that existed was an *oral* agreement

reached through the respective brokers for the parties and a *proposed* written Charter Party agreement which was never executed by respondent." (App 61a)

However the Affidavit of the Owners' broker alleges that:

"5) When the terms of this contract were agreed to by the Owners and the Charterers, Messrs. Lessin International Inc. the Charterers' brokers, Messrs. Ocean Freighting & Brokerage Corporation prepared a written statement of the agreement and forwarded it to my office for signature. The written agreement which was forwarded to my office and the covering letter which accompanied it, are annexed to this affidavit as Exhibits "A" and "B" respectively." (App 31a-32a) (Exhibit "A" is at App 33a; Exhibit "B" is at App 42a).

The Charterer's broker has not denied this allegation nor has the charterer or its attorneys in any of the papers filed with the District Court below, all of which are included in the Appendix on appeal. The pertinent paragraphs of the Affidavit executed by the president of the charterer alleges only that:

(a) "4. As President I require that my express approval be obtained prior to the execution of any contract by or on behalf of the Corporation." (App 23a).

(As we have demonstrated under Point I *supra*, whether the contract was signed is entirely irrelevant to the question of whether or not the arbitration provision can be enforced.)

and

(b) "5. Neither I, nor anyone acting on behalf of Lessin has ever entered into a 'written agreement for

arbitration' with Petitioner to arbitrate any dispute whatsoever. This is confirmed by the fact that the alleged contract of charter party, annexed as Exhibit 'A' to the petition, is unsigned." (App 23a)

(Of course, the affiant cannot have personal knowledge that no one acting on behalf of Lessin has ever entered into a written agreement for arbitration with the Petitioner.)

We respectfully submit that the Petitioner has raised a triable issue, and, in fact, the Respondent has failed to present any evidence to refute the Petitioner's allegations. The Respondent has not denied that the Charterers' broker negotiated with Owners' broker on behalf of charterer. The charterer has not denied that the charterer's broker reached an agreement with Owners' broker on behalf of charterer. The charterer has not denied that the agreement was reduced to writing by charterers' broker and signed by Owners' broker. The charterer has not denied that the charter party agreement prepared by charterers' broker was forwarded to the owners' broker as an enclosure to a signed covering letter.

Judge Ward's decision that the written contract was only a "proposal" is entirely inconsistent with the affidavits. The unrefuted affidavit of Owners' broker demonstrates that the written contract was "an agreement."

Moreover, it should be noted that the arbitration clause is one of twenty-three (23) typed additional clauses which were prepared by charterers' broker, after negotiation and included in the charter contract together with the printed form clauses.

Thus it would seem that the Respondent admits that there is an agreement and the agreement is in writing. The Respondent's only argument must be that the agreement is unsigned. Even if the Respondent, however, denies that

there is an agreement, the Petitioner is entitled to a formal trial on this point. At trial the Petitioner should be allowed to present evidence on the question of whether or not there was any agreement at all. The Petitioner should also be allowed to present evidence at trial as to whether or not the facts of this case are sufficient to bring the case within Section 206 of the Federal Arbitration Act which merely requires an agreement and does not require a writing—signed or unsigned.

CONCLUSION

Accordingly, it is respectfully requested that the judgment ordered by the United States District Court for the Southern District of New York, dismissing the petition be reversed and that the case be remanded to the District Court for trial pursuant to Section 4 of the Arbitration Act, on the issue of whether or not the parties have entered into an enforceable arbitration agreement.

Respectfully submitted,

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